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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board	)	
on Universal Service	)	

COMMENTS OF 360° COMMUNICATIONS COMPANY

In accordance with Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), 360° Communications Company ("360°")[1] hereby submits these comments in response to the petitions for reconsideration of the FCC's May 8, 1997, Report and Order in the above-captioned proceeding.[2]

As detailed below, 360° strongly supports the position of several petitioners – namely, AirTouch Communications, Inc. ("AirTouch"), Nextel Communications, Inc. ("Nextel"), and ProNet Inc. ("ProNet") – who agree that the Commission erred in concluding that Section 332(c)(3) of the Communications Act does not, at least currently, preclude states from requiring commercial mobile radio service ("CMRS") providers to contribute to state universal service support mechanisms.[3] As pointed out by the petitioners, the statutory scheme established in

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[1] 360° is the country's second largest publicly held cellular provider. The company offers wireless voice and data service to 2.4 million customers in more than 100 markets throughout 15 states.

[2] *Federal-State Joint Board on Universal Service,* FCC 97-157 (rel. May 8, 1997) [hereinafter *Universal Service Order*].

[3] *Id.*, ¶ 791.

Section 332(c)(3), and the express language of Section 332(c)(3)(A), clearly demonstrate that states are not permitted to impose universal service support obligations on CMRS providers unless and until CMRS offerings become a substitute for landline telephone exchange service for a substantial portion of the communications in the state in question. Accordingly, 360° endorses the view of AirTouch, Nextel, and ProNet that the Commission must reconsider that aspect of the *Universal Service Order* that subjects CMRS providers to state universal service support obligations without regard to whether such offerings have in fact reached the level prescribed by Section 332(c)(3)(A).

I. The Commission's Conclusion That States May Currently Require CMRS Operators To Contribute To State Universal Service Support Is Contrary To The Statutory Scheme Set Forth In Section 332 And Conflicts With The Language Of Section 332(c)(3)(A).

In their petitions for reconsideration, AirTouch, Nextel, and ProNet maintain that the Commission erred in interpreting Sections 332(c)(3) and 254(f) of the Communications Act to allow states to impose universal service support obligations on CMRS providers before CMRS offerings are found to be substitutes for basic landline telephone exchange service in the state in question.[4] 360° agrees. As pointed out by the petitioners, the statutory scheme set forth in Section 332(c)(3) – including Section 332(c)(3)(A) – creates a *federal* regulatory framework for CMRS offerings. Requiring CMRS providers to comply with individual state universal service

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[4] *See* AirTouch Communications, Inc., Petition for Clarification and Partial Reconsideration, CC Docket No. 96-45, at 3, 12-16 (filed July 17, 1997) [hereinafter *AirTouch Petition*]; Nextel Communications, Inc., Petition for Reconsideration, CC Docket No. 96-45, at I, 5-12 (filed July 17, 1997) [hereinafter *Nextel Petition*]; ProNet Inc., Petition for Reconsideration, CC Docket No. 96-45, at i, 9-13 (filed July 17, 1997) [hereinafter *ProNet Petition*].

support mechanisms directly conflicts with Congress's overall purpose in adopting the 1993 amendments to Section 332, and is contrary to the express language of Section 332(c)(3)(A).

Specifically, as noted by the petitioners, in 1993, Congress adopted various amendments to the Communications Act in an effort to foster the nationwide development of wireless telecommunications services through establishment of a uniform federal regulatory framework for all mobile service offerings.[5] To this end, Congress amended Section 2(b) of the Act, which historically denied the FCC jurisdiction over all aspects of intrastate telecommunications that are severable from the interstate portion or do not conflict with a Federal policy. As amended, Section 2(b) states that, "*[e]xcept as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title . . .*, nothing in this chapter shall be construed to apply to or to give the Commission jurisdiction [over intrastate telecommunications]."[6]

In addition, Congress enacted Section 332(c)(3), which preempts state regulation of CMRS entry and rates. In particular, Section 332(c)(3)(A) states that, "[n]otwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile

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5 *See AirTouch Petition,* at 12-13; *Nextel Petition*, at 6-8; *ProNet Petition*, at 11. *See also* H. Rep. No. 103-111, 103rd Cong., 1st Sess. 260 (1993) (House Report) (explaining that the preemption provisions of Section 332 are intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure"); H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. 490 (Conference Report) (indicating that Congress intended to create a "federal regulatory framework governing the offering of all commercial mobile service[s]").

6 47 U.S.C. § 152(b) (emphasis added).

service . . . ."[7] Moreover, of particular importance to the matter at hand, Section 332(c)(3)(A) further provides that:

> Nothing in this subparagraph [Section 332(c)(3)] shall exempt providers of commercial mobile service (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State)* from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[8]

Thus, by its plain language, Section 332(c)(3)(A) permits states to impose universal service obligations on CMRS carriers only "*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State.*"[9] As underscored by AirTouch, Nextel, and ProNet, this portion of the statute therefore precludes states from imposing universal service requirements on CMRS providers *unless and until* such services are a substitute for landline telephone exchange service for a substantial portion of the state in question. Significantly, AirTouch also points out that, approximately four months ago, the Commission explicitly found that CMRS offerings are *not* a substitute for landline exchange services.[10] This being the case, 360° agrees with AirTouch's observation that, "under the express and unambiguous directive of Section 332(c)(3), states may not impose universal service obligations on CMRS providers" at this time.[11]

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7 47 U.S.C. § 332(c)(3)(A).

8 *Id.* (emphasis added).

9 *Id.*

10 *See AirTouch Petition,* at 13. *See also Competition in the Commercial Mobile Radio Services, Second Annual Report,* 7 Comm. Reg. (P&F) 1, 31-33 (1997).

11 *Id. See also Nextel Petition,* at 8 ("where CMRS services are *not* a substitute for landline

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AirTouch, Nextel, and ProNet correctly note that nothing in the Telecommunications Act of 1996 ("1996 Act") changed Congress's approach to the regulation of CMRS offerings, as set forth in Section 332(c)(3), nor does anything in the 1996 Act alter Section 332(c)(3)(A)'s limitation on when CMRS providers may be required to contribute to state universal service support mechanisms.[12] Although the Commission appears to have interpreted Section 254(f) of the Act to allow states to require CMRS providers to contribute to state universal service plans at any time,[13] by its express language, Section 254(f) applies only to carriers that provide *intrastate* telecommunications services. As discussed above and as pointed out by AirTouch, ProNet, and Nextel, in adopting Section 332(c)(3), Congress dictated that CMRS offerings are to be considered exclusively *interstate* for purposes of government regulation.[14] As such, the requirement of Section 254(f) obligating "[e]very telecommunications carrier *that provides intrastate telecommunications services* . . .[to] contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State,"[15] does not extend to CMRS operators unless and until CMRS operations are a substitute for landline telephone exchange service, as provided in Section 332(c)(3)(A).

(...Continued)
telephone exchange service for a substantial portion of the communications in a state, CMRS providers *are* exempt from state-mandated universal service assessments based on the carriers' intrastate revenues").

12 *See AirTouch Petition,* at 15; *Nextel Petition,* at 9-10; *ProNet Petition,* at 11-12.

13 *Universal Service Order,* ¶ 791.

14 *See ProNet Petition,* at 11; *AirTouch Petition,* at 15; *Nextel Petition,* at 9. *See also supra* pp. 2-4 and accompanying notes.

15 47 U.S.C. § 254(f) (emphasis added).

Finally, in addition to the fact that relevant statutory sections preclude states from requiring currently that CMRS providers contribute to state universal service support mechanisms, any decision to the contrary is simply unworkable and inconsistent with Congress's overall intent in adopting the 1993 amendments to Section 332. In this regard, Nextel correctly notes that the *Universal Service Order* does not prescribe or suggest the methodology that CMRS providers are to follow in attempting to apportion their revenues among the federal and fifty state jurisdictions.[16] As Nextel points out that, "[t]he Commission's approach could cause the several states to establish inconsistent jurisdictional bases that result in multiple, inconsistent assessments in violation of long-recognized constitutional and legal principles."[17] Similarly, Nextel notes that, "it must be recognized that wireless calls may become interstate based on the location of the called and calling parties as well as the facilities and routing used on the call."[18]

It is precisely these types of complications that caused Congress to adopt the 1993 amendments preempting state regulation of CMRS entry and rates, and precluding states from imposing universal service requirements on CMRS operators in accordance with Section 332(c)(3)(A). Congress established a federal regulatory framework for CMRS operations in recognition of the special concerns presented as a result of the nature of mobile service offerings, which necessarily "operate without regard to state lines."[19] It is only logical to assume that the same principles and concerns apply in the context of CMRS contributions to universal service

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16 *Nextel Petition,* at 9.

17 *Id.*

18 *Id.*

19 *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 260 (1993) (House Report).

support mechanisms. Clearly, CMRS operators are required to contribute to the support of universal service – they are, however, required to do so *only* through a unitary federal support system – not through fifty varying state support mechanisms. In this connection, Nextel correctly notes that Congress specified this approach in recognition of the fact that "jurisdictional separations of traffic on mobile networks would be administratively burdensome, costly and complex, given that mobile wireless networks will, at any one moment have an unpredictable and constantly changing mix of calls within and across state boundaries."[20] The Commission's decision allowing states to require CMRS providers to contribute to state support mechanisms, without regard to the additional limiting language of Section 332(c)(3)(A), imposes precisely the sort of "patchwork" regulatory requirements that Congress sought to eliminate in establishing a uniform, federal regulatory framework for the regulation of CMRS operations, and is contrary to the entire intent of Section 332(c)(3). Accordingly, 360° agrees that this decision should be reconsidered.

II. Conclusion

For the reasons set forth above, 360° supports the petitions filed by AirTouch, Nextel, and ProNet asking the Commission to reconsider that aspect of the *Universal Service Order* that subjects CMRS providers to state universal service support mechanisms before CMRS offerings are a substitute for landline service, as provided in Section 332(c)(3)(A) of the Act. The Commission's decision in this regard directly conflicts with Congressional efforts to create a

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[20] *Nextel Petition,* at 9.

uniform federal framework for the regulation of commercial mobile radio service offerings and is inconsistent with the express language of Section 332(c)(3)(A) of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 18th day of August, 1997, a true copy of the attached "Comments of 360° Communications Company" has been served, via first class, postage prepaid mail, on the following persons:

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